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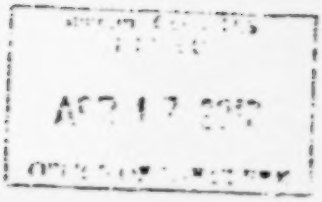

Nos. 11-246 and 11-247

In the Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER

v.

DAVID PATCHAK, ET AL.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

Respondent Patchak seeks an order compelling the Secretary of the Interior to relinquish title to a parcel of land in Wayland Township, Michigan (the Bradley Property), that the United States currently holds in trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Band). Patchak's suit is barred for two independent reasons: first, the United States has not waived its sovereign immunity from suits challenging its

title to Indian trust lands; and second, Patchak lacks prudential standing because the injury he alleges is not within the zone of interests protected or regulated by the statutory provision on which he relies. The court of appeals erred in allowing Patchak's suit to proceed, and Patchak's efforts to defend its holding are unavailing.

I. PATCHAK'S SUIT IS BARRED BY SOVEREIGN IMMUNITY

As this Court has explained, "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). Earlier this Term, the Court reaffirmed that "an unmistakable statutory expression of congressional intent" is required to waive that immunity. *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012). No such expression exists here. In particular, because neither the Quiet Title Act (QTA), 28 U.S.C. 2409a, nor the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, waives the sovereign immunity of the United States in the circumstances of this case, Patchak's suit is barred by sovereign immunity.

The QTA permits the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a(a). But that waiver of immunity is limited in two ways that are important to this case. First, because the QTA "does not apply to trust or restricted Indian lands," *ibid.*, it "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians," *United States* v. *Mottaz*, 476 U.S. 834, 842 (1986). Second, because "[t]he complaint" in a QTA proceeding must "set forth with particularity

the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstances under which it was acquired," 28 U.S.C. 2409a(d), the QTA makes relief available only to plaintiffs who themselves claim an interest in the land at issue. Both of those limitations apply here, and therefore, as Patchak recognizes (Br. 14-18), the QTA does not permit this suit.

Instead, Patchak insists that his suit may proceed under 5 U.S.C. 702, which was amended in 1976 to provide that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (5 U.S.C. 702). But the last sentence of Section 702 expressly provides that "[n]othing herein"—that is, nothing in the APA's waiver of sovereign immunity—"confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.* The QTA is such an "other statute," and for that reason, Patchak may not invoke the APA's waiver of sovereign immunity. See *Block*, 461 U.S. at 286 n.22 (QTA is an "other statute" that "expressly" forbids the relief if the suit is untimely under the QTA's 12-year limitations period).

A. The Quiet Title Act Provides The Exclusive Vehicle For Bringing Any Suit In Which A Plaintiff Challenges The Government's Title To Land

Like the court of appeals, Patchak emphasizes that, because he does not himself claim an interest in the Bradley Property, he cannot bring a suit under the QTA. And like the court of appeals, Patchak reasons (Br. 14-15) that the QTA "governs only traditional quiet-title actions, i.e., actions where the plaintiff claims some interest in the property at issue," and therefore (Br. 22) "the QTA's sovereign-immunity provisions simply do not apply to his APA claim." That reasoning is the basis for Patchak's entire argument, but it is not valid.

It is true that the QTA itself *permits relief* only in cases in which the plaintiff asserts a claim to the land at issue, but it does not follow that the QTA is irrelevant to the sovereign-immunity analysis in all other cases. Patchak simply assumes that the set of cases in which the QTA displaces the APA's waiver of sovereign immunity is limited to those in which the plaintiff claims an interest in the land. That assumption is inconsistent with the text of the APA, with background principles of sovereign immunity, and with this Court's precedents.

1. As an initial matter, Patchak appears to suggest that, simply because his "claim cannot be brought under the Quiet Title Act" (Br. 14), he must therefore be able to assert it by invoking the APA's waiver of sovereign immunity. The unstated premise of that reasoning is that the APA waiver is available in any case in which no other waiver of immunity applies. That interpretation of the APA is foreclosed by the text of Section 702, which plainly contemplates that a statute can be one that "grants consent to suit," thus triggering the exception to the APA's waiver, even if it "forbids the relief

which is sought"—that is, even in a case in which it does not allow the plaintiff to obtain relief. 5 U.S.C. 702; cf. *Brown* v. *GSA*, 425 U.S. 820, 834 (1976) (holding that "a precisely drawn, detailed statute pre-empts more general remedies," even when, on the facts of a particular case, the narrower statute provides no relief).

Patchak also advances a somewhat broader theory, suggesting (Br. 29) that the scope of a statute is determined by "the source of the right and the type of claim being brought." That theory, too, fails to take account of the text of Section 702. Congress's use of the word "any" in the phrase "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" reflects its intent to reach *all* statutes that expressly or impliedly preclude relief. 5 U.S.C. 702; see *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning."). And by referring to "the relief which is sought," Congress made clear that it is the relief sought in the complaint—not just the identity of the plaintiff who is seeking it—that determines whether the Section 702 waiver of immunity is available.

As relevant here, the QTA permits suits "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a); see Gov't Br. 20-22. The United States claims an interest in the Bradley Property in trust for the Band, and Patchak "dispute[s]" the United States' title to that land, arguing that the acquisition of trust title was not authorized by statute. The "adjudicat[ion]" of that "disputed title" is precisely the relief provided by the QTA. Because the limitations of the QTA prohibit that relief in the circumstances of this case, Patchak may not obtain the same relief under the APA. If the QTA bars relief to those

with a direct stake in the status of the property, it would make little sense to conclude that Congress intended to allow persons like Patchak to dispute the government's title on the basis of a far more attenuated interest.

2. Patchak's theory is also inconsistent with background principles of sovereign immunity underlying Section 702. First, as already explained, the general rule of sovereign immunity is that the United States may not be sued at all without its consent. See *Block*, 461 U.S. at 287. By the time of the 1976 amendments to the APA, there was a patchwork of exceptions to that rule, rendering the field of immunity "a mass of confusion." S. Rep. No. 996, 94th Cong., 2d Sess. 25 (1976) (*1976 Senate Report*) (letter to Sen. Edward M. Kennedy from then-Assistant Attorney General Antonin Scalia). In amending Section 702, Congress replaced that system with "a system directly and honestly based on relevant governmental factors." *Ibid*. Those "governmental factors" involve the effect of the litigation on the *government*, and that effect is determined by the relief that is sought, not by the identity of the plaintiff. Here, for example, the divestiture of the government's trust title to the Bradley Property would have no less of an effect on the government as trustee for the Band if issued at the behest of Patchak, a non-claimant, than if issued at the behest of someone claiming to own the property.

Second, because of the background rule of immunity, pre-APA statutes waiving immunity were enacted with the understanding that relief was unavailable except to the extent that it was permitted under the particular waiver statute. As Assistant Attorney General Scalia explained, Congress would therefore have had no occasion "expressly" to forbid relief other than that to which

it consented. *1976 Senate Report* 26-27. It is for that reason that the bill that became the 1976 amendment to Section 702 was amended to bar relief in cases where another statute "impliedly forbids the relief which is sought." 5 U.S.C. 702; see Gov't Br. 17-18. Patchak says little about the "impliedly" provision, and he does not address its history, but together they demonstrate that Congress intended to establish a broad rule that "in most if not all cases where statutory remedies already exist, these remedies will be exclusive." *1976 Senate Report* 27. Patchak's limited conception of the extent to which the QTA precludes APA relief is inconsistent with that history.

Third, any doubt about the extent to which the QTA makes relief unavailable under the APA is resolved by the canon that "a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text" and that "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *Cooper*, 132 S. Ct. at 1448 (citation omitted). In this case, any ambiguity as to whether, for purposes of the APA's waiver of sovereign immunity, the QTA is an "other statute that grants consent to suit" but "expressly or impliedly forbids the relief which is sought" must therefore be resolved in favor of preclusion of relief under the APA.

3. As explained in the government's opening brief (at 13-15), even in the absence of the limitation in the last sentence of Section 702, general principles of statutory interpretation would compel the conclusion that a plaintiff may not rely on the APA to circumvent the specific limitations prescribed in the QTA. See *United States* v. *Fausto*, 484 U.S. 439 (1988). Patchak's response to that point is to repeat his contention (Br. 20) that he "is not bringing a suit within the QTA's scope";

but as the cases cited in the opening brief make clear, a precisely drawn statute can preclude relief for purposes of Section 702 even in cases where the narrower statute does not itself provide a remedy.

For example, it is well settled that because the Tucker Act, 28 U.S.C. 1491(a)(1), provides only for an award of money damages in a contract action against the United States, it precludes resort to the APA's waiver of immunity by a contractor seeking specific relief. *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986) (Scalia, J.). On Patchak's theory, however, a contract-based injunction against the government would be entirely permissible so long as it were sought by a non-party to the contract, who would not be "bringing a suit within the [Tucker Act's] scope." Br. 20. Section 702 offers no support for that surprising proposition.

Patchak relies (Br. 25, 29-31) on *Michigan* v. *United States Army Corps of Engineers*, 667 F.3d 765 (2011), cert. denied, 132 S. Ct. 1635 (2012), in which the Seventh Circuit held that, even though the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, does not authorize injunctive relief, a plaintiff seeking an injunction to abate a nuisance may invoke Section 702. The court in *Michigan* made an error paralleling that of Patchak, in that it failed to appreciate that the FTCA's comprehensive specification of the tort liability of the United States creates a "fair implication," 667 F.3d at 775, that other forms of liability are precluded. The court also found it significant that Michigan's nuisance action based on federal common law was not "cognizable" under the FTCA, which makes state law the source of substantive liability. *Id.* at 776. In fact, however, because the FTCA's waiver of sovereign immunity does not extend to claims based on federal law, the United States "simply has not ren-

dered itself liable" in cases where "federal law, not state law, provides the source of liability." *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994).

Patchak's approach is also in tension with this Court's interpretation of 5 U.S.C 701(a)(1), which provides that the APA's review provisions do not apply "to the extent that * * * statutes preclude judicial review." In *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984), the Court invoked that provision to restrict the class of plaintiffs who could challenge milk pricing orders, holding that consumers, who were not authorized to challenge such orders under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, could not rely on the APA to bring a challenge. In so holding, the Court rejected an argument paralleling that advanced by Patchak: that a party who has been expressly denied a right of review under one statute (in *Block*, milk consumers; here, a person not claiming an interest in land) may nevertheless invoke the general review provisions of the APA. See 467 U.S. at 349 ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.").

B. Permitting Patchak's Suit To Proceed Would Undermine The Purposes Of The Quiet Title Act

As explained in the government's opening brief (at 22-23, 25-27), the limitations on the scope of the QTA serve important purposes. Patchak's interpretation of the APA would permit the evasion of those limitations, and the frustration of those purposes, through artful pleading.

1. Congress deemed the Indian-lands exception to be "necessary to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands," because a "unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *Mottaz*, 476 U.S. at 843 n.6 (quoting H.R. Rep. No. 1559, 92d Cong., 2d Sess. 13 (1972) (*1972 House Report*)). Even the possibility of such suits would create uncertainty about the security of Indian trust title for at least the duration of the six-year APA statute of limitations, thus hindering the promotion of "tribal self-sufficiency and economic development." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)).

And even in cases not involving Indian lands, Congress sought to ensure that a QTA plaintiff would not be able to "force the United States from possession and thereby interfere with the operations of the Government." *1972 House Report* 6. To that end, the QTA provides that, if the plaintiff prevails, "the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation." 28 U.S.C. 2409a(b); see 28 U.S.C. 2409a(c) (prohibiting issuance of a preliminary injunction). That provision is closely tied to the requirement that the plaintiff be "the person [claiming] to be entitled" to the land. Patchak does not appear to dispute that the option of paying compensation rather than giving up title is unavailable when the plaintiff claims no

entitlement to the land. Thus, Patchak's reading would deny the government an option that Congress expressly sought to preserve.

2. Under Patchak's theory, anyone *except* a person claiming an adverse interest in the particular parcel of real property at issue is free to challenge the United States' title to trust lands by suing an officer of the United States under the APA. Patchak contends (Br. 35) that if such a suit were to succeed, ownership of the lands would simply revert to the Band. But in this case, the Band was not the previous owner of the Bradley Property. That owner voluntarily transferred title to the United States and is not a party to this case. If Patchak prevailed, the government would be obliged to give up its trust title to the Bradley Property, without the option of paying compensation to the former owner under Section 2409a(b).

More broadly, even outside the Indian-lands context, Patchak's position would subject the United States to numerous suits to adjudicate its title to real property ever though no one in the suit has asserted a competing claim to the same property. Such suits could resemble the one rejected by the Seventh Circuit in *Shawnee Trail Conservancy* v. *United States Department of Agriculture*, 222 F.3d 383, 386-388 (2000), cert. denied, 531 U.S. 1074 (2001); see Gov't Br. 27-28, or one in which a claimant who lacks the right to sue under the QTA engages a cooperative third party to sue under the APA, see Gov't Br. 29. Patchak does not address that implication of his position.

3. Patchak attempts (Br. 34) to dismiss the serious practical difficulties resulting from his interpretation of the APA and the QTA as mere "policy considerations." But those difficulties illustrate the perversity of permit-

ting a party who claims no interest in the land to sue to bar the United States from holding title to land in trust for Indians, and to divest the United States of that title, even though the same suit would be barred if brought by a party who actually claimed an interest in the land. Section 702 was enacted just four years after the QTA, and there is no indication that Congress intended it to sweep away the QTA's carefully crafted limitations and to create such an illogical regime. To the contrary, the limitation set out in the last sentence of Section 702 makes clear that Congress intended just the opposite. See *Block*, 461 U.S. at 286 n.22.

C. The Presumption Of Reviewability Does Not Assist Patchak

Patchak points out (Br. 12) that there is a presumption in favor of judicial review of agency action, and he asserts (Br. 35) that application of sovereign-immunity principles in this case would mean that the Secretary "gets to unilaterally decide whether [his] land-in-trust decisions are subject to judicial review." That is incorrect. By regulation, the Secretary must give 30 days' notice before taking land into trust for a tribe. 25 C.F.R. 151.10. During that 30-day period, anyone who can establish standing has the ability to bring any challenge to the Secretary's decision, and the APA's waiver of sovereign immunity will permit the suit to go forward. In this case, for example, an organization opposed to the trust acquisition litigated the issue for more than three years, which resulted in a ruling on the merits from the court of appeals and a decision on a petition for a writ of certiorari from this Court. See *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), cert. denied, 555 U.S. 1137 (2009).

Patchak argues (Br. 35) that the Secretary could halt such litigation by "taking the land into trust at any time following the 30-day window," and he suggests (Br. 24) that the Secretary did so in this case "with the goal of avoiding judicial review" in his lawsuit. But the Secretary took title to the Bradley Property only after the conclusion of the litigation in *Michigan Gambling Opposition*—the only suit filed within the 30-day period. Patchak was well aware that that action was possible, and he could have attempted to prevent it by obtaining an injunction. In fact, Patchak twice asked the district court for an order barring the acquisition, but the district court denied relief, and Patchak did not appeal. C.A. App. 64; J.A. 6-7, 11. Had Patchak been able to establish a likelihood of success on the merits, he could have obtained an injunction and preserved his right to review.[1]

Finally, Patchak speculates (Br. 35) that the Secretary might ignore the regulation providing for notice, thereby taking land into trust while avoiding any possibility of judicial review. But there is no basis for presuming that the Secretary would act in bad faith and in

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[1] Emphasizing that he filed suit before the Secretary took the Bradley Property into trust, Patchak invokes (Br. 24 n.2) the so-called time-of-filing rule, which, in certain circumstances, assesses jurisdiction based upon the facts in existence at the time a plaintiff's complaint is filed, even if the facts have later changed. That rule is generally applicable only in diversity cases. See *ConnectU LLC* v. *Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008); 11-246 Cert.-Stage Reply Br. 8-10. In any event, the time-of-filing issue is outside the scope of the questions presented and was not considered by the court of appeals below, so there is no reason for this Court to consider it at this time. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to reach issues that "were not addressed by the Court of Appeals" because this Court is "a court of review, not of first view").

defiance of his own regulations. See *USPS* v. *Gregory*, 534 U.S. 1, 10 (2001) (noting "that a presumption of regularity attaches to the actions of government agencies"). And the ability of a plaintiff to imagine a scenario in which an agency's action might evade review is not a basis for refusing to apply established principles of sovereign immunity, which inevitably operate, at least to some extent, to restrict review of government action.

II. PATCHAK LACKS PRUDENTIAL STANDING

The doctrine of prudential standing requires a plaintiff to show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (quoting *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 397 (1987)). Here, that provision is Section 5 of the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 985, which authorizes the Secretary to acquire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. But Section 5 of the IRA has nothing to do with the interests asserted in Patchak's suit, which involve the effect of gaming—conducted under a different statute—on nearby landowners. Patchak therefore lacks standing to maintain this suit.

A. Patchak's Alleged Injuries Are Unrelated To The Interests Protected Or Regulated By Section 5 Of The Indian Reorganization Act

1. Patchak does not attempt to defend the court of appeals' theory that the allegation of a "cognizable" injury—a requirement of Article III standing—is suffi-

cient to establish prudential standing. Pet. App. 10a.[2] Instead, Patchak observes (Br. 37) that the test for standing "is not whether a plaintiff is a statutory beneficiary," and that the zone-of-interests test does not require an inquiry into whether "Congress specifically intended to benefit the plaintiff." *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). While it is true that Congress need not have set out to benefit the particular plaintiff, there must nevertheless be some relationship between the "interests to be protected or regulated" by the statute and the interests asserted in the suit. *Bennett* v. *Spear*, 520 U.S. 154, 175 (1997) (quoting *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970)). Here, Section 5 of the IRA authorizes the Secretary "to acquire * * * any interest in lands * * * for the purpose of providing land for Indians," 25 U.S.C. 465, while Patchak asserts an interest in avoiding diminished property values, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land" near the site on which the Band has built a gaming facility. Pet. App. 10a. The relationship between that authorization and those interests is difficult to discern, and Patchak nowhere explains it.

2. According to Patchak (Br. 40), "the fact that Congress imposed a limitation on the [Secretary's] authority to take land into trust only for certain Indian tribes implies that Congress intended *someone* to be able to enforce that limitation." Even if that reasoning were valid, it would not help Patchak, because it is undisputed that there *is* someone who can enforce the statute—namely, state and local governments. See Gov't Br. 31-32. Be-

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[2] All references to "Pet. App." are to the appendix in No. 11-247.

cause state and local governments can lose some taxing and regulatory authority when land is taken into trust, they are arguably protected or regulated by the provisions of the IRA that authorize, and limit, the taking of land into trust. They therefore have prudential standing to challenge agency action that allegedly violates those provisions.

Patchak observes (Br. 40) that "[s]tate and local governments cannot necessarily be relied upon to enforce" Section 5 of the IRA, and he imagines (Br. 41) a situation in which such governments might choose to support an unauthorized land acquisition. To prevent that possibility, he concludes (*ibid.*), Congress must have "intended individual members of the community, and not just governmental entities, to be able to enforce" the statute. In reality, State and local governments have shown themselves to be willing and able to challenge the Secretary's land-into-trust decisions when they believe those decisions to be unlawful. For example, in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), on which Patchak relies, the plaintiffs were the State of Rhode Island and the Town of Charlestown, Rhode Island.[3] More to the point, it is always true that, if no one with standing chooses to sue, then agency action will not be reviewed. But that does not mean that Congress intended every member of the public to have standing. Cf. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (explaining, in the context of Article III standing, that

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[3] Although the merits of Patchak's claim under Section 5 of the IRA are not before the Court, his discussion of *Carcieri* appears to conflate the status of being "under Federal jurisdiction" in 1934, which is required for the Secretary to take title to land into trust for a tribe, 555 U.S. at 382, with the status of being "federally recognized" in 1934, which is not, see *id.* at 397-399 (Breyer, J., concurring). See, *e.g.*, Br. 2.

"[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing"). Nor does it follow that all those who "police a statute's limitations fall within that statute's zone of interests" (Patchak Br. 46), since every plaintiff who challenges an alleged violation of a statute can be said to be "polic[ing] a statute's limitations."

3. To support his claim of standing, Patchak relies heavily (Br. 42-44) on the Secretary's regulations. Those regulations prescribe procedures to follow, and factors to consider, when the Secretary decides whether to take land into trust for a Tribe; the factors include "[t]he purposes for which the land will be used," 25 C.F.R. 151.10(c), and "potential conflicts of land use," 25 C.F.R. 151.10(f); see 25 C.F.R. 151.11(a) (directing consideration of the criteria listed in Section 151.10 in evaluating requests for the acquisition of off-reservation lands). In Patchak's view (Br. 43), the regulations demonstrate "that land uses and the conflicts they may cause are within [Section 5 of the IRA's] zone of interests." That argument lacks merit.

Significantly, the opening paragraph of Section 151.10, which Patchak does not quote, provides that "[u]pon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired," and "[t]he notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. 151.10. Only then does the regulation state that "[t]he Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status."

Ibid. Accordingly, those criteria must be understood by reference to the entities to which the regulation provides for notice, and from which it contemplates receiving comments: state and local governments, not neighboring landowners. Even if the regulations were relevant to the prudential-standing inquiry, they would not support the view that the zone of interests embraces purely private concerns about use of the land, as opposed to governmental interests in taxation and land-use planning.

4. Finally, Patchak suggests (Br. 44) that the Court should look to other provisions of the IRA, beyond Section 5, in evaluating the zone of interests. That approach would be contrary to *Bennett*, in which the Court held that "[w]hether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." 520 U.S. at 175-176. Patchak cites several decisions (Br. 45) for the proposition that other provisions can define the scope of the zone of interests, but only two of them even involved standing, and they do not support his argument. In *Thompson* v. *North American Stainless, LP*, 131 S. Ct. 863 (2011), the Court stated that an employee alleging that he was fired in retaliation for his fiancée's discrimination complaint was "within the zone of interests sought to be protected by Title VII," *id.* at 870. But although the Court referred to "Title VII" in general, its evaluation of the zone of interests addressed only the anti-retaliation provision on which the plaintiff relied, and it did not cite any other provision as expanding the zone of interests. And in *FEC* v. *Akins*, 524 U.S. 11

(1998), after determining that the plaintiffs were within the zone of interests of the disclosure provisions of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, the Court noted that it had "found nothing in the Act that suggests Congress intended to exclude [the plaintiffs] from the benefits of these provisions, or otherwise to restrict standing," 524 U.S. at 20. In recognizing that other provisions of the statute might limit standing, the Court did not suggest that they could create it where it did not otherwise exist.

In any event, no other provision of the IRA protects or regulates any interest that is relevant to Patchak's suit. Patchak points (Br. 44) to 25 U.S.C. 463, which directs the Secretary to consider "the public interest" when deciding whether to restore certain surplus lands to Indian tribes. This case, of course, does not involve the restoration of surplus lands. More importantly, a requirement that an agency take account of "the public interest"—a common requirement in federal statutes, see, *e.g.*, 47 U.S.C. 309(a) (FCC licensing)—is not a kind of citizen-suit provision, conferring standing on any member of "the public" who objects to an agency's action. When Congress wishes to include a citizen-suit provision in a statute, it knows how to do so. See, *e.g.*, *Bennett*, 520 U.S. at 171.

B. The Interests Protected Or Regulated By The Indian Gaming Regulatory Act Are Not Relevant To Patchak's Standing To Sue Under The Indian Reorganization Act

The court of appeals believed that Patchak has standing to sue under the IRA because the interests underlying his suit are within the zone of interests protected by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* Pet. App. 8a. Relying on *Air Cou-*

rier Conference v. *American Postal Workers Union*, 498 U.S. 517 (1991), the court held that it is appropriate to examine IGRA's zone of interests because that statute is "linked to" the IRA. Pet. App. 8a. For the reasons explained in the government's opening brief (at 35-37), the court's analysis was flawed, and Patchak does not attempt to defend it, conceding (Br. 53) that "[t]his case is very different from *Air Courier*." Although Patchak nevertheless persists in arguing that the interests protected by IGRA are relevant to this case, his arguments lack merit.

Patchak observes (Br. 49) that "prudential standing is a matter of inferring congressional intent," and that "this Court routinely looks to related statutes when interpreting a particular statute." That may be true in some circumstances, but Patchak does not explain how any provision of IGRA (enacted in 1988) sheds light on what Congress intended when it enacted the IRA 54 years earlier. And even if IGRA were somehow relevant to interpreting the IRA, it would not follow that the interests regulated by the two statutes are the same.

Patchak relies (Br. 48-49) on *Clarke*, a prudential-standing case in which this Court considered the interests protected by two different statutory provisions that were enacted at different times. But the Court in *Clarke* examined the two provisions because one of them had created "a limited exception to the otherwise applicable requirement of" the other. 479 U.S. at 401. That type of relationship—an amendment of one statute by another—does not exist between the IRA and IGRA. Although Patchak states (Br. 53) that IGRA "is a specific limitation on the [Secretary's] authority to take land into trust under" 25 U.S.C. 465, just the opposite is true; the cited provision of IGRA provides explicitly that "[n]oth-

ing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. 2719(c). Nor is it true, as Patchak suggests (Br. 51), that "the IRA and the IGRA operate in tandem because unless land is taken into trust, such land ordinarily cannot be used for Class III gaming." For one thing, land can be acquired in trust in other ways, not just through the IRA. See, *e.g.*, Graton Rancheria Restoration Act, Pub. L. No. 106-568, Tit. XIV, 114 Stat. 2939 (25 U.S.C. 1300n *et seq.*); Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798. For another, gaming can be conducted on land that is not trust land at all, such as lands within an Indian reservation and restricted fee land. See 25 U.S.C. 2703(4).

In other words, for purposes of standing, the only relationship between IGRA and the IRA is that they both pertain to Indians and Indian tribes. But as this Court cautioned in *Air Courier Conference*, conducting the prudential-standing analysis at such a high "level of generality" would "deprive the zone-of-interests test of virtually all meaning." 498 U.S. at 529-530. Because Patchak has not attempted to sue under IGRA, the interests protected by that statute are not relevant to his standing.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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